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**Supreme Court of the United States**

**October Term, 1968.**

**No. 436**

**PAULETTE BOUDREAUX RODRIGUE, ET AL.,  
and  
ELLA MAE DUBOIS DORE, INDIVIDUALLY, ETC.,**  
**Petitioners,**

**versus**

**AETNA CASUALTY AND SURETY COMPANY, ET AL.,  
and  
THE LINK BELT COMPANY, ET AL.,**  
**Respondents.**

**ORIGINAL BRIEF ON BEHALF OF PETITIONERS,  
PAULETTE BOUDREAUX RODRIGUE, ET AL.,  
AND ELLA MAE DUBOIS DORE, INDIVIDUALLY,  
ETC.**

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**ORIGINAL BRIEF ON BEHALF OF PETITIONERS,  
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## **MAY IT PLEASE THE COURT:**

This brief is filed jointly by both petitioners in the captioned case. In the court below, the United States Court of Appeals for the Fifth Circuit, there were two separate cases (Paulette Boudreaux Rodrigue, et al. against Aetna Casualty and Surety Company, et al., and Ella Mae Dubois Dore, Individually, etc. against The Link Belt Company, et al.). Each case presented the same issue. Accordingly petitioners filed, as authorized by Supreme Court rule 23 (5), a joint petition for and were granted certiorari.



## REFERENCE TO REPORTS OF OPINIONS IN THE COURT BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit in the *Rodrigue* case is officially reported at 395 F.2d 216. The opinion of the District Court in the *Rodrigue* case is not reported.

The opinion of the United States Court of Appeals for the Fifth Circuit in the *Dore* case is officially reported at 391 F.2d 671. The opinion of the District Court in the *Dore* case is not reported.

## JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1). The judgment of the Court of Appeals in the *Rodrigue* case was made and entered on May 16, 1968. The judgment of the Court of Appeals in the *Dore* case was made and entered on March 25, 1968, rehearing denied on May 15, 1968. On August 13, 1968, application for an extension of time for filing the joint petition for certiorari was made and it was granted with an order of this court extending the time for filing through August 23, 1968, on which day the petition was filed.

## STATUTES INVOLVED.

Pertinent portions of the Statutes involved are:

1. The Death on the High Seas Act, 46 U.S.C.  
761-768



"Section 1 (46 U.S.C. 761) Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person or corporation which would have been liable if death had not ensued.

Section 2 (46 U.S.C. 762) Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the *pecuniary* loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Section 4 (46 U.S.C. 764) Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained

in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

Section 7 (46 U.S.C. 767) Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone." (Emphasis added.)

2. The Outer Continental Shelf Lands Act, 43 U.S.C. 1331 et seq.

"§ 1331(a)(2):

To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf and artificial islands and fixed structures thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margins of the Outer Continental Shelf \* \* \*." (Emphasis added.)

3. The Louisiana Death Act, Louisiana Civil Code,  
Article 2315

"The right to recover damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased."

**THE QUESTIONS PRESENTED FOR REVIEW.**

Whether the Death on the High Seas Act is the exclusive remedy for death on an artificial island in the Outer Continental Shelf, or, on the other hand, whether the Death on the High Seas Act can be supplemented by the law of the adjacent state which is expressly extended to the artificial islands by the Outer Continental Shelf Lands Act?

Phrased differently, the issue can be stated: Whether an action can be maintained for the nonpecuniary losses, e.g. loss of love and affection resulting from death on an artificial island in the Outer Continental

Shelf, in addition to pecuniary losses recoverable under the Death on the High Seas Act, when those losses are recoverable under the law of the adjacent state which is extended to the artificial islands by the Outer Continental Shelf Lands Act but are not recoverable under the Death on the High Seas Act?

### STATEMENT OF THE CASE.

#### *The Rodrigue Case*

For the death of Butley J. Rodrigue which occurred on March 7, 1964, his widow and two children brought three suits in the United States District Court for the Eastern District of Louisiana.

The death occurred when Mr. Rodrigue fell from high in the derrick of a drilling rig positioned on a fixed structure (artificial island) located in the Outer Continental Shelf approximately twenty-eight miles south of the Louisiana coastline. Mr. Rodrigue landed on the structure floor sustaining crushing injuries which resulted in his immediate or almost immediate death.

The fixed structure (artificial island) consists of a platform, i.e., a flooring, which was about 60 feet above the water level and which was supported by posts (legs) permanently fixed into the seabed. On this platform is a drilling rig with derrick.

The drilling rig was at the time owned and operated by Mayronne Drilling Company which was in-

sured by Aetna Casualty and Surety Company. Humble Oil and Refining Company was the owner of the structure and the mineral lease involved. Mr. Rodrigue was an employee of the Loomis Hydraulic Testing Company which had been called by Humble to come onto the structure to perform a test on the drill pipe then being used by Mayronne.

It was alleged in the three suits (two civil actions and one in admiralty pursuant to the Death on the High Seas Act, 46 U.S.C. 761-768) that Mr. Rodrigue died in the course of performing the test and that his death was caused by the joint negligence of Mayronne and Humble.

The reason for bringing more than one suit for the same death was to obtain full recompense for all of the damages sustained because of the death of Mr. Rodrigue. The two civil actions, one against Humble and Aetna<sup>1</sup> with Federal jurisdiction based on diversity of citizenship and the other against Mayronne Drilling Company with Federal jurisdiction based on the Outer Continental Shelf Lands Act, 43 U.S.C. 1333 (b), are brought pursuant to the Louisiana Death Act, Article 2315 of the Louisiana Civil Code. The Louisiana Death Act grants a cause of action not only for the pecuniary losses sustained as a result of the death but also for loss of society, love, companionship, and affection. The Death on the High Seas Act only grants remuneration for pecuniary losses.

<sup>1</sup> Aetna Casualty and Surety Company, as liability insurer of Mayronne Drilling Company was made a party defendant pursuant to the Louisiana Direct Action Statute, La. R.S. 22:655.



The three cases were consolidated for purposes of trial with the jury to hear the two Civil Actions, and the Judge in Admiralty to apply the Death on the High Seas Act.

On the morning of the trial, motions to dismiss the Civil Actions were filed by the defendants and were granted, the trial judge holding that the Death on the High Seas Act is the exclusive remedy for death occurring on an artificial island in the Outer Continental Shelf even though the Outer Continental Shelf Lands Act expressly extends the law of the adjacent state to the artificial islands.

Then the Court tried the admiralty action pursuant to the Death on the High Seas Act, and finding Mayronne solely at fault, awarded plaintiff the full amount of the pecuniary losses sustained by the death of Butley Rodrigue. The Court's opinion in the admiralty action is reported at 266 F. Supp. 1.

Plaintiff, seeking also recompense of the nonpecuniary losses compensable under the state death act, appealed the dismissal of the two Civil Actions.

The United States Court of Appeals for the Fifth Circuit, in a brief opinion simply referred to its very recent decision in the *Dore* case and affirmed, holding "the exclusive remedy under the circumstances is the Death on the High Seas Act."



### *The Dore Case*

The *Dore* case is an action for the death of Joseph Dore which occurred on March 14, 1965. Decedent, Joseph Dore, an oil field worker, was killed while working on a stationary offshore drilling platform on the Outer Continental Shelf in the Gulf of Mexico south of the State of Louisiana, approximately fifty miles seaward from Marsh Island, when a crane which he was operating collapsed and fell more than sixty feet. By stipulation between the parties, it was agreed that the work was being performed on the "Outer Continental Shelf" and that the accident occurred in the following manner:

"That the decedent was a crane operator working on a crane on a pedestal on a stationary platform; That the crane was being used to unload a barge or vessel located immediately next to the stationary platform; That while a load was being lifted from the vessel with an intention to place it on the stationary platform, the crane toppled over with the decedent in the crane and fell to the barge or vessel below, which was being unloaded and the decedent was killed when he fell on the barge."<sup>2</sup>

Petitioner brought a single action claiming a remedy under the General Maritime Laws, the Death on the High Seas Act, 46 U.S.C.A. 761, et seq., and under

<sup>2</sup> This stipulation was attached to the trial judge's certification under Rule 54 (b), Federal Rules of Civil Procedure. See Footnote No. 4 in the Court of Appeals decision in the *Dore* case which is reproduced in the single appendix.

Article 2315 of the Civil Code of the State of Louisiana against the Link Belt Company and Road Equipment Company, Inc. for alleged negligence in designing, manufacturing, assembling, selling, installing and servicing the crane which was involved in the accident and which caused the death of Joseph Dore, and for alleged breach of expressed and implied warranties as manufacturers, assemblers, sellers and installers of the crane. For herself and her three children, petitioner claimed recompense not only for pecuniary losses recoverable under the Death on the High Seas Act but also for the nonpecuniary losses (loss of love and affection, etc.) available under the Louisiana Death Act.

The district court, on Motions to Dismiss filed by the defendants, rendered judgment on October 26, 1966, restricting the plaintiffs' claims to the Death on the High Seas Act, 46 U.S.C.A. 761, et seq., and striking from the complaint all items of damages other than pecuniary loss sustained. The district judge then certified the question pursuant to rule 54 (b), Federal Rules of Civil Procedure.

The United States Court of Appeals for the Fifth Circuit affirmed, holding that the exclusive remedy of plaintiff in *Dore* was the Death on the High Seas Act and ostensibly relying on a Ninth Circuit case, *Higa vs. Transocean Airlines*, 230 F.2d 780 (1956), cert. den. 352 U.S. 802. (But such reliance was misplaced because the *Higa* death did not occur in the Outer Continental Shelf but rather occurred in the open ocean at a place where no statute or jurispru-

dence had extended the applicability of the state death act—in fact the court in the *Higa* case specifically stated that had there been such a statute or jurisprudence the state law would have supplemented the Death on the High Seas Act.)<sup>3</sup>

### ARGUMENT.

The recovery which is sought here is for recompense for losses in addition to the losses for which the Death on the High Seas Act allows recovery. The Death on the High Seas Act only allows recompense for the pecuniary losses sustained because of death (see 46 U.S.C. 762, and see for example, *Inger vs. Cie de Transports*, 323 F.2d 257; cert. den. 376 U.S. 949) whereas the Louisiana Death Act additionally grants recompense for loss of love, society, affection and companionship. See for example, *Silverman vs. Travelers*, 277 F.2d 257 (5th Cir. 1960); *Parker vs. Smith*, 147 So.2d 407 (La. App. 1963).

<sup>3</sup> Moreover, in the *Dore* case, the Fifth Circuit quoted from the above referred to *Higa* case, but the language, the exchange between the legislators, that is quoted from the *Higa* case in the *Dore* case for the proposition that the Death on the High Seas Act is the exclusive remedy is not pertinent to that issue! In that quoted language, the court in the *Higa* case was dealing with an additional issue that was present in the *Higa* case, to-wit: whether a Death on the High Seas Act case could be heard by a jury in a civil action or whether, on the other hand, it could be heard only in admiralty by the judge alone. Properly, the *Higa* court quoted the congressmen in ruling that the Death on the High Seas Act must be heard in admiralty. But this quoted language has nothing to do with whether the Death on the High Seas Act is an exclusive remedy—yet that is the issue for which the Fifth Circuit in the *Dore* case cites the quoted exchange between the congressmen as controlling! See the *Dore* case, at p. 60 in the single appendix (paragraph beginning "The legislative history . . .").

The Outer Continental Shelf Lands Act, a Federal Statute, adopts the law of the adjacent state, here Louisiana, to the extent that it is not inconsistent with federal law and specifically declares that state law to be the law of the United States and also specifically declares that that law is applicable to the fixed structures as if they were within the State of Louisiana. That Statute, in pertinent part reads:

43 U.S. Code, sec. 1331 (a) (2)

"To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf and artificial islands and fixed structures thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf \* \* \* all of such applicable laws shall be administered and enforced by the appropriate officers of the United States \* \* \*."

Of course, no attempt at a double recovery is being made. Should this court rule that the now federally adopted Louisiana Death Act and the Death on the High Seas Act are both applicable, there would be only one recompense for the pecuniary losses; the allowance of recompense for the nonpecuniary losses



as additionally allowed by Louisiana would simply supplement the recovery allowed by the Death on the High Seas Act.

That portion of the Louisiana Law which allows a remedy for nonpecuniary losses would fill the void, i.e. provide a remedy which is not present, in Federal law relative to recompense for loss of love, society, affection and companionship in wrongful death actions for death on the high seas.

As seen in the quoted portion of the Outer Continental Shelf Lands Act above, the only limitation or reservation in the blanket application of the law of the adjacent state (as adopted federal law) to the artificial islands in the Outer Continental Shelf is that portion of the state law which is inconsistent with the other federal laws and regulations is not to be applied. As will be shown below, the jurisprudence clearly shows that it is not inconsistent with federal laws (the Death on the High Seas Act) and regulations for state law to grant additional remedies in death cases to what is available under federal law.

**THE DEATH ON THE HIGH SEAS ACT SPECIFICALLY PROVIDES THAT IT DOES NOT AFFECT STATE REMEDIES.**

The language contained in the Death on the High Seas Act specifically provides that state rights of action or remedies for death shall not be affected by the act! The Death on the High Seas Act provides:

## Section 7. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." (46 U.S.C. Section 767.)

As of the time of the adoption of the Death on the High Seas Act (1920), there were state statutes which were construed as giving or regulating rights of action or remedies for death on the high seas. See for example, *The Hamilton (Old Dominion Steamship Company vs. Gilmore)*, 207 U.S. 398, 28 S. Ct. 133 (1907); *Southern Pac. Co. vs. De Valle Da Costa*, 190 F. 689 (1st Cir. 1911); *International Nav. Co. vs. Lindstrom*, 123 F. 475 (2nd Cir. 1903); *The E. B. Ward, Jr.*, 17 F. 456 (C.C. E.D. La. 1883).

With the opinion of Mrs. Justice Holmes, the United States Supreme Court in the case entitled *The Hamilton (Old Dominion Steamship Company vs. Gilmore)*, 207 U.S. 398, 28 S. Ct. 133 (1907) ruled that the Delaware Death Act which allowed the widow or widower to "maintain an action for and recover damages for death and loss occasioned by negligence or unlawful violence" could and did apply to a death which occurred on the high seas. In pertinent part the Court ruled:

"A certiorari was granted by this court to settle the question, as stated by the petitioner,



whether the Delaware statute applies to a claim for death on the high seas, arising purely from tort \* \* \* the judiciary act of 1789 [1 Stat. at L. 77, chap. 20, sec. 9], 'saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it' (Rev. Stat. sec. 563, cl. 8, U. S. Comp. Stat. 1901, p. 457), leaves open the common-law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. \* \* \* Accordingly, it has been held that a statute giving damages for death caused by a tort might be enforced in a state court, although the tort was committed at sea. *American S. B. Co. v. Chase*, 16 Wall. 522, 21 L. Ed. 369. So far as the objection to the state law is founded on the admiralty clause in the Constitution, it would seem not to matter whether the accident happened near shore or in mid-ocean, notwithstanding some expressions of doubt."

The Court concluded that the claimants were entitled to the full benefit of the statute. The Delaware Act involved was not only a survival statute but also allowed recovery for damages to the widow or widower because of the death. It is the same type of act as is the Louisiana Death Act.

The United States Circuit Court of Appeals for the Fifth Circuit, in the case entitled *The E. B. Ward, Jr.*, 17 Fed. 456 (1883), applied the very same Louisiana Death Act that is at issue in the instant case.

to allow damage for wrongful death, including the nonpecuniary damages for losses (there termed loss of society) to a death which occurred in a collision between two vessels on the high seas. The Court held that the Louisiana wrongful death act was applicable and granted recovery even though the death had occurred on the high seas.

**THE LEGISLATIVE HISTORY OF THE DEATH ON THE HIGH SEAS ACT SHOWS THAT IT IS NOT AN EXCLUSIVE REMEDY AND THAT ON THE CONTRARY, STATE REMEDIES FOR DEATH ON THE HIGH SEAS WERE SPECIFICALLY RESERVED.**

The legislative history of the Death on the High Seas Act makes it absolutely clear that the Death on the High Seas Act is not an exclusive remedy; the legislative history shows that it was specifically intended that the rights then being granted by some states for death on the high seas should not be affected by the Death on the High Seas Act.

Immediately before it was passed, the then Senate Bill No. 2085 was amended with the express purpose of providing that the Death on the High Seas Act shall not affect the state remedies for death on the high seas. Before amended, Section 7 of the Act read as follows:

"Sec. 7. That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act

as to causes of action accruing within the territorial limits of any State. Nor shall this act apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone."

The amendment deleted the last portion of the first sentence, i.e. deleted were the words "as to causes of action accruing within the territorial limits of any State".

As seen in the Congressional Record, the legislators at the time of the enactment of the Death on the High Seas Act, were questioning and differing in opinion among themselves as to whether the proposed act (as it was before the said amendment) would have the effect of making the Death on the High Seas Act the exclusive remedy for death on the high seas so as to make the state remedies unavailable.<sup>4</sup>

Mr. Mann of Illinois stated that he wanted to get the question of whether state remedies for death on the high seas were to be excluded before the House for consideration and that accordingly he was offering an amendment (the amendment referred to above, which was enacted) which amendment would, if enacted, make it clear that state remedies would not be excluded.<sup>5</sup> The Congressional Record shows:

<sup>4</sup> Congressional Record—House, 66th Congress, 2nd. Session (1920) V, 59, pp. 4482-4486 (for March 17, 1920).

<sup>5</sup> Page 4484, Congressional Record—House, 66th Congress, 2nd. Session (1920) V, 59 (for March 17, 1920).

"Mr. MANN of Illinois. In order to get it before the House for consideration, I move to strike out, page 3, line 12, after the word 'act,' the words 'as to causes of action accruing within the territorial limits of any State.'

The SPEAKER pro tempore. The gentleman from Illinois offers an amendment, which the Clerk will report. The Clerk read as follows:

Amendment offered by Mr. MANN of Illinois: page 3, line 12, after the word 'act,' strike out 'as to causes of action accruing within the territorial limits of any State.'

Mr. MANN of Illinois. If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the State or not."

Mr. Mann's amendment was called to a vote and passed.

Prior to the vote on the amendment there was considerable debate, some of the legislators believing that uniformity was the prevailing consideration. The committee report<sup>7</sup> which accompanied the bill into the House and which is dated February 25, 1920, some 20 days prior to the amendment, indicated that

<sup>6</sup> Page 4484, Congressional Record—House, 66th Congress, 2nd Session (1920) V. 59 (for March 17, 1920).

<sup>7</sup> 66th Congress, 2nd Session, House of Representatives, Report No. 674, dated February 25, 1920 (designated to accompany S. 2085) entitled "Actions for Death on the High Seas".

at least some if not most of the advocates for the bill intended that the remedy be an exclusive one and were of the definite opinion that the proposed Section 7 of the act (as it read before Mr. Mann's amendment) made the remedy exclusive.<sup>8</sup> This highlights the clarity of the intent of the legislators who voted for and passed Mr. Mann's amendment.

In the Congressional Record, the case entitled "The Hamilton", 207 U.S. 398, was mentioned as an example of the states allowing recovery pursuant to the state death act for deaths on the high seas.<sup>9</sup> In the legislative discussion, it was noted that some states granted remedies, (i.e. the death act of some states was deemed to apply on the high seas) and some did not.<sup>10</sup> In this connection, it is to be noted that the Louisiana Death Act was one of those which had, prior to the Death on the High Seas Act, been applied to allow recovery for death on the high seas. In *The E. B. Ward, Jr.*, 17 Fed. 456 (1883) the same Louisiana Death Act that is at issue in the instant case was applied to allow damages for wrongful death, including the nonpecuniary damages for losses (there termed loss of society) to a death which occurred in a collision between two vessels on the high seas.

<sup>8</sup> See especially the letter of Honorable Harrington Putnam which was attached to and made a part of the House Report No. 674 (found at Pages 2, 3, and 4 of said report).

<sup>9</sup> Page 4483, Congressional Record—House, 66th Congress, 2nd Session (1920) V. 59 (for March 17, 1920).

<sup>10</sup> Page 4483, Congressional Record—House, 66th Congress, 2nd Session (1920) V. 59 (for March 17, 1920).



In discussing the legislative history of the Death on the High Seas Act the Ninth Circuit Court of Appeals in the case of *Higa vs. Transocean Airlines*, 230 F.2d 780 (1956) cert. den. 352 U.S. 802, referred to the Louisiana case, *The E. B. Ward, Jr.*, *supra*, as one of the cases that Mr. Mann had in mind when he offered the amendment. The Court stated:

"In considering this contention it is of importance that the High Seas Act *deprived no state or federal court of a then existing right*. As to the state courts 46 U.S.C.A. sec. 767 provides:

Sec. 767. Exceptions from operation of chapter. The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter.

As originally drafted, the bill had an added clause limiting the state to acts in its own waters, reading: 'as to causes of action accruing within the territorial limits of any state'. Representative Mann offered an amendment striking out this clause. Mann gave as his reason for striking out the limiting clause that it was to save state statutes giving jurisdiction in high seas death cases. Some opposed because they wanted the Act to be exclusive. Others agreed to the amendment on the ground that Section 767 as passed would be held invalid on the ground of the constitutional control of Congress discussed above. Congress agreed with Mann who offered



the amendment and the limitation was stricken from the bill.

Further, Mann no doubt had in mind some one of the federal cases, holding that the laws of the state controlled the action of persons within ships on the high seas and had construed their death statutes as applying there. *Southern Pac. Co. vs. De Valle Da Costa*, 1 Cir., 1911, 190 F. 689; *International Nav. Co. vs. Lindstrom*, 2 Cir., 1903, 123 F. 475; *The James McGee*, S.D. N.Y. 1924, 300 F. 93; *The E. B. Ward, Jr.*, C.C. E.D. La. 1883, 17 F. 456. (Emphasis added.)

Even if Congress had not agreed with the interpretation of the proponent of the amendment, we would hesitate to construe the exceptive clause as depriving the states of the then existing jurisdictions shown as exercised in the above cited cases."

Thus, in the instant case, there is the pre-existing unpre-empted Louisiana State Death Act available under its own power and also the same Louisiana Death Act available to the area in question by the Federal Statute (the Outer Continental Shelf Lands Act).

It is abundantly clear from its legislative history that the Death on the High Seas Act is not an exclusive remedy and that in the instant case, the Louisiana Death Act is available to supplement it.

**THE JURISPRUDENCE CLEARLY SHOWS THAT THE DEATH ON THE HIGH SEAS ACT IS NOT AN EXCLUSIVE REMEDY AND THAT STATE STATUTES AND OTHER FEDERAL STATUTES PROPERLY SUPPLEMENT IT AND GRANT COLLATERAL OR ADDITIONAL REMEDIES.**

The Second Circuit Court of Appeals in the case of *Doyle vs. Albatross Tanker Corporation*, 367 F.2d 465, 1967 A.M.C. 201, had under consideration the situation in which a seaman had been killed on the high seas. Though his administrators had brought an action under the Jones Act, they wished to supplement that action by also suing the employer under the Death on the High Seas Act so as to take advantage of rights allowed under the Death on the High Seas Act which were not available under the Jones Act. The defendant there contended that either the Jones Act or the Death on the High Seas Act should be the exclusive remedy and cited *Lindgren vs. U. S.*, 281 U.S. 38 (1930) and *Gillespie v. U. S. Steel Corporation*, 379 U.S. 148 (1964). The Court readily distinguished *Lindgren* and *Gillespie* stating that the congressional intent was that as to deaths on the high seas the remedies were not exclusive. The Court ruled:

"Moreover, contrary to appellants' contentions, it appears to be the settled law of the lower federal courts, expressed in numerous cases, that both statutory remedies may be availed of for the purpose of recovering damages for the wrongful deaths of seamen caused by occur-

rences on the high seas, and that the action in admiralty created by the Death on the High Seas Act may be pursued by the personal representative of a deceased sailor as well as the action at law provided for in the Jones Act. See, e.g., *Chermesino vs. Vessel Judith Lee Rose, Inc.*, 211 F. Supp. 36 (D. Mass., 1962, aff'd, 317 F. (2d) 927 (1 Cir.), cert. denied, 375 U.S. 931 (1963); *Moore-McCormack Lines, Inc. vs. Richardson*, 1962 A.M.C. 804, 295 F. (2d) 583 (2 Cir. 1961), cert. denied, 368 U.S. 989, 1962 A.M.C. 2211 (1962); *Whitaker vs. Blidberg Rothschild Co., Inc.*, 1961 A.M.C. 773, 195 F. Supp. 420 (E.D. Va.) aff'd, 1962 A.M.C. 678, 296 F. (2d) 554 (4 Cir., 1961); *Civil vs. Waterman S. S. Corp.*, 1955 A.M.C. 21, 217 F. (2d) 94 (2 Cir., 1954); *Middleton vs. Luckenbach S. S. Co.*, 1934 A.M.C. 649, 70 F. (2d) 326 (2 Cir., 1934); *Ridgedell vs. Olympic Towing Corp.*, 1962 A.M.C. 1831, 205 F. Supp. 952 (E.D. La., 1962). *Petition of Gulf Oil Corp.*, 1960 A.M.C. 341, 172 F. Supp. 911 (S.D.N.Y., 1959); *McLaughlin vs. Blidberg Rothschild Co., Inc.*, 1959 A.M.C. 1385, 167 F. Supp. 714 (S.D.N.Y., 1958); *Tetterton vs. Arctic Tankers, Inc.*, 1954 A.M.C. 397, 116 F. Supp. 429 (E.D. Pa., 1953); *Syville vs. Waterman S. S. Corp.*, 1949 A.M.C. 1578, 83 F. Supp. 718 (S.D.N.Y. 1948); *Four Sisters*, 1947 A.M.C. 1623, 75 F. Supp. 399 (D. Mass., 1947). The text writers agree with this analysis. See 1 Benedict, Admiralty, 384 (6th ed., 1940); 2 Norris, Law of Seamen, 775-77 (2d ed.,

1962); Gilmore & Black, *The Law of Admiralty*, 304 (1957)."

In *Higa vs. Transocean Airlines*, 230 F.2d 780 (1956) cert. den. 352 U.S. 802, a plane on its way to Hawaii crashed in the high seas and caused the death of Higa. Higa had been a citizen of Hawaii. His administrators brought suit seeking recovery under the Death on the High Seas Act and also recovery under the Hawaiian wrongful death statute. The Court took special note that the plane had been owned not by an Hawaiian corporation but by a California corporation. The Court dismissed the action based on the Hawaiian Code because "there is no provision of that Code or decisions of the Hawaiian Courts making it applicable to death on the high seas beyond the territorial waters" 230 F.2d at 781. This language is most favorable to petitioners in the instant cases inasmuch as there is a provision of law, the Outer Continental Shelf Lands Act specifically applying the Louisiana Death Act to the locality where the deaths occurred and there is a decision, *The E. B. Ward, Jr.*, 17 Fed. 456, applying the Louisiana Death Act to death on the high seas.

There are additional numerous decisions of the district courts touching the question at issue. For example, the court in *Abbot vs. J. S.*, 207 F. Supp. 468 (S.D.N.Y. 1962), 1962 A.M.C. 750 ruled:

"The Supreme Court held that before the DHSA there was no action for wrongful death under the

general maritime law. *Western Fuel Co. vs. Garcia*, 257 U.S. 233 (1921); *Harrisburg*, 119 U.S. 199 (1886). However, admiralty courts in the absence of the DHSA invoked state wrongful death statutes to grant such recovery. *Western Fuel Co. vs. Garcia*, *supra*, (death in territorial waters); *Hamilton*, 207 U.S. 398 (1907) (death on high seas). The DHSA created a federal cause of action for wrongful death on the high seas, and, when death occurs in territorial waters, preserved the rights given by the wrongful death statute of that state, 46 U.S. Code, sec. 767. It is generally agreed that the DHSA does not preempt the field of recovery for injuries sustained on the high seas which result in death." (Emphasis added.) See Comment, *supra*, 60 Colum. L. Rev. at 536-37, and authorities cited.

In *McLaughlin vs. Blidberg Rothschild Company*, 156 F. Supp. 379 (S.D.N.Y. 1957) and in the companion case (*McLaughlin vs. Blidberg Rothschild Company*, 156 F. Supp. 381) involving deaths on the high seas in which the plaintiffs claimed pecuniary losses under the Death on the High Seas Act requesting trial by the Judge in admiralty and also brought suit, with trial by jury, under the Japanese law which allows recovery not only for pecuniary losses but for the other damages as well. The procedure there was the same as requested by Petitioner Rodrigue in the instant case. In the *McLaughlin* cases the Court allowed the procedure and ordered a joint trial of



the civil and admiralty actions inasmuch as there were some common issues involved.

Thus it is clearly seen that the Death on the High Seas Act is not an exclusive remedy.

Certainly, in light of the cases cited and referred to above it can not be said that it is inconsistent with federal laws and regulations for state law to grant additional remedies in death cases to what is available under federal law. Additionally, see *Romero vs. International Terminal Operating Co.*, 358 U.S. 354, 1958 A.M.C. 832, wherein this Court stated that state death statutes which grant more than what would have been granted by the bare federal maritime law are not "inconsistent" with federal law or federal maritime law. The Court stated:

"It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a



breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity.” (Emphasis added.)

As seen in the quoted language above, wrongful death is not an area of law requiring absolute uniformity; especially is this true when the Federal Death on the High Seas Act provides a uniform basic recovery with the State Death laws, where available, supplementing the basic recovery.

The state death acts are applied regularly in admiralty. See, for example *Tungus v. Skovgaard*, 358 U.S. 588, 1959 A.M.C. 813; *United Pilots Association v. Helecki*, 358 U.S. 613, 1959 A.M.C. 588; *Hess vs. U.S.*, 361 U.S. 314, 1960 A.M.C. 527; *Byrd vs. Napoleon Avenue Ferry*, 152 F. Supp. 573 (E.D. La. 1954); aff. 227 F.2d 958 (5th Cir., 1954). All of the above cases, and many, many others, illustrate that in a federal jurisdiction, i.e. over the navigable waters of the United States, the state death acts, which differ from state to state, are regularly used in actions for wrongful death.

Similarly, a case most in point is the decision of the United States Supreme Court in the case of *Just v. Chambers*, 312 U.S. 383, 61, 687, 1941 A.M.C. 430. In that case the court had before it the then novel question of whether in an admiralty proceeding the

causes of action for personal injury die with the person or whether, on the other hand, a state survival statute could be applied in admiralty so as to preserve the claim. In dealing with that question the Supreme Court ruled:

"For, while the injury occurred on navigable waters, these were within the limits of Florida whose legislation provided that the cause of action should survive. And it is not a principle of our maritime law that a court of admiralty must invariably refuse to recognize and enforce a liability which the State has established in dealing with a maritime subject. *On the contrary, there are numerous instances in which the general maritime law has been modified or supplemented (emphasis added) by state action, as e.g. in creating liens for repairs or supplies furnished to a vessel in her home port. The Lottawanna, 88 U.S. 558, 580; The J. E. Rumbell, 148 U.S. 1, 12. With respect to maritime torts we have held that the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation. The City of Norwalk, 55 Fed. 98; Western Fuel Company v. Garcia, 257 U.S. 232, 242; Great Lakes Company v. Kierejewski, 261 U.S. 479, 1923 A.M.C. 441; Vancouver Steamship Co. v. Rice, 288 U.S. 445, 1933 A.M.C. 487."*

Immediately before the portion of the opinion above, the Supreme Court very pertinently (here) observed:

"The 'Death on the High Seas' Act, 46 Mason's U.S.C., secs. 761-768, is not applicable, as it occupies a limited field and even as to wrongful death provides that the provisions of state statutes shall not be affected." (Emphasis added.)

**THERE IS NOTHING UNUSUAL IN ALLOWING CUMULATIVE REMEDIES FOR THE SAME INCIDENT.**

There is nothing whatsoever unusual in allowing cumulative remedies for the same incident. In fact, it is the rule rather than the exception in maritime cases. As is seen in *Doyle vs. Albatross Tanker Corporation*, 367 F.2d 465, both the Jones Act and the Death on the High Seas Act can be applied to the same death. That an injured seaman is entitled to a remedy under both the doctrine of unseaworthiness and the Jones Act is "old hat" to say the least. Additionally, the allowance of both an action for damages and an action for maintenance and cure arising out of the same injury is universally recognized and unquestioned.

The men who work on the offshore oil platforms in the Outer Continental Shelf do so at great risk to their lives and incur the perils of the sea. Yet they are denied a Jones Act remedy and the warranty of seaworthiness. See for example, *Movable Offshore Com-*

pany vs. Ousley, 346 F.2d 870 (C.A. 5th, 1965): Inasmuch as there is a statute, the Outer Continental Shelf Lands Act, extending the law of the adjacent state to the artificial islands, why should these men be denied the supplemental remedy?

### CONCLUSION.

It is respectfully submitted that the Death on the High Seas Act does not provide the exclusive remedy for wrongful death occurring upon one of the artificial islands in the Outer Continental Shelf off the coast of Louisiana but rather that the Louisiana Death Act as extended by the Outer Continental Shelf Lands Act supplements it and provides additional remedies.

Accordingly, the decisions of the Fifth Circuit Court of Appeals in the matters entitled *Paulette Boudreaux Rodrigue, et al. against Aetna Casualty and Surety Company, et al.*, and *Ella Mae Dubois Dore, Individually, etc. against The Link Belt Co., et al.*, should be reversed, and these cases should be remanded for further proceedings.<sup>11</sup>

Respectfully submitted,

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A. Deutsche O'Neal,

<sup>11</sup> The *Dore* case should be remanded to the United States District Court for the Western District of Louisiana, Lafayette Division. As to the two civil actions in the *Rodrigue* case, Civil Action No. 3298 of the Eastern District of Louisiana should be remanded to the Eastern District of Louisiana,

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Baton Rouge Division, and Civil Action No. 3109 of the Eastern District of Louisiana should be remanded to the United States Court of Appeals for the Fifth Circuit for ruling on one issue which was not acted on by the Fifth Circuit in view of its dismissal of each of the civil actions on the ground that there was to be no civil action for the death, the exclusive remedy being the Death on the High Seas Act. The unruléd upon issue in the appeal of Civil Action No. 3109 is whether the dismissal, on summary judgment, of one of the defendants in that civil action was proper. The trial judge dismissed, on motion for summary judgment, Aetna Casualty and Surety Company, ruling that the Louisiana Direct Action Statute La. R.S. 22:655 did not apply to an accident occurring on a fixed platform in the Outer Continental Shelf. This ruling was specifically included in the appeal of Civil Action No. 3109 (See Rodrigue Record p. 114). While the appeal to the Fifth Circuit was pending, the Louisiana Supreme Court in another case ruled that the Louisiana Direct Action Statute does apply to accidents occurring outside the boundaries of the State of Louisiana (*Webb vs. Zurich Insurance Company*, 205 So.2d 398 (La. 1967), followed in *Michel vs. Bahn*, 207 So.2d 150 (La. App. 4th Cir. 1968) and as to an accident occurring on a fixed structure in the Outer Continental Shelf in *Taylor vs. Fishing Tools, Inc.*, 274 F. Supp. 666 (E.D.La. 1967). However, inasmuch as this issue was not reached by the Fifth Circuit in the appeal in Civil Action No. 3109, Civil Action No. 3109 should be remanded to the Fifth Circuit for official ruling.



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**CERTIFICATE.**

This is to certify that I have this day mailed a copy of the above and foregoing Original Brief on Behalf of Petitioners, Paulette Boudreaux Rodrigue, et al. and Ella Mae Dubois Dore, Individually, etc., to Mr. Richard C. Baldwin, Adams and Reese, 847 National Bank of Commerce Building, New Orleans, Louisiana; Mr. Thomas W. Thorne, Jr., Lemle, Kelleher, Kohlmeyer, Matthews & Schumacher, National Bank of Commerce Building, New Orleans, Louisiana; Mr. Lancelot P. Olinde, Humble Oil & Refining Company, P. O. Box 60626, New Orleans, Louisiana; Mr. H. Lee Leonard, Voorhies, Labbe, Fontenot, Leonard & McGlasson, Lafayette, Louisiana; and James E. Diaz, Davidson, Meaux, Onebane & Donohoe, 201 West Main Street, Lafayette, Louisiana.

December ...., 1968.

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